

Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, DC 20554

RECEIVED

SEP - 2 1998

FEDERAL COMMUNICATIONS COMMISSION
OFFICE OF THE SECRETARY

In the Matter of)
)
Forbearance from Applying) WT Docket No. 98-100
Provisions of the)
Communications Act to)
Wireless Telecommunications)
Carriers)

REPLY COMMENTS OF RADIOFONE, INC.

Radiofone, Inc. (Radiofone), by its attorneys, respectfully submits these reply comments in response to comments filed concerning the Notice of Proposed Rulemaking (NPRM)¹ in the captioned proceeding. In particular, Radiofone requests the Commission to retain Sections 201 and 202 of the Communications Act of 1934, as amended (the Act), as they apply to all CMRS providers. In an era when carriers are subject to fewer Commission rules, Sections 201 and 202 are necessary to ensure the reasonableness and nondiscrimination of their rates and practices.

In the MO&O in the captioned proceeding, the Commission denied PCIA's request for forbearance from Sections 201 and 202 for PCS providers. The Commission stated:

[W]e find that the record does not permit us, consistent with the three-prong test set out in section 10 of the Act, to forbear from enforcing sections 201 and 202 with respect to broadband PCS providers.

¹ Forbearance from Applying Provisions of the Communications Act to Wireless Telecommunications Carriers (Memorandum Opinion and Order and Notice of Proposed Rulemaking), FCC 98-134, WT Docket No. 98-100, released July 2, 1998 [hereinafter MO&O and NPRM].

First, the record does not show that existing competition in the market in which broadband PCS providers compete has rendered sections 201 and 202 unnecessary to prevent unjust, unreasonable, and unjustly or unreasonably discriminatory practices. Second, the record does not show that sections 201 and 202 are no longer necessary to protect consumers from discriminatory charges and practices by broadband PCS providers. Finally, we do not believe that forbearance from enforcing sections 201 and 202 is consistent with the public interest. The Commission has, pursuant to its authority under section 332(c)(1)(A), forbore from the application of sections 203, 204, 205, 211, 212 and 214 of Title II of the Communications Act to any service classified as CMRS, including broadband PCS. Sections 201 and 202 continue to provide important safeguards to consumers of broadband PCS against carrier abuse in an area that has already been largely deregulated by the Commission. We therefore find that at this time it is necessary to maintain sections 201 and 202, which enable the Commission to ensure that broadband PCS carriers provide service in a just, reasonable, and non-discriminatory manner, and to provide all consumers, including other carriers, with a mechanism through which they can seek redress for unreasonable carrier practices.²

These conclusions apply equally well to all CMRS providers, and to the instant proceeding, for two reasons. First, the record does not show that existing competition in the wireless market has rendered Sections 201 and 202 unnecessary to prevent unjust, unreasonable, and unjustly or unreasonably discriminatory practices and charges. Indeed, no party filing comments in this proceeding specifically requested the FCC to forbear from applying Sections 201 and 202 to wireless telecommunications carriers. Motorola made a passing remark that it supports broad forbearance for all CMRS,³ and GTE stated that the Commission

² MO&O para. 30.

³ Motorola Comments at 1.

should favor enforcement over regulation.⁴ Neither Motorola nor GTE addressed the three-prong forbearance test, and GTE did not explain how the Commission can enforce rules if there are no rules to enforce.

Second, continued enforcement of Sections 201 and 202 is in the public interest. These sections provide safeguards to carriers and consumers of wireless telecommunications services against abuses by other carriers. In Radiofone's case, its cellular customers rely on the roaming services provided by other cellular carriers, and on the interconnection services provided by local exchange carriers. Sections 201 and 202 of the Act provide baseline standards for the rates and practices of these other carriers as they serve Radiofone's customers.

The primary provider of interconnection services to Radiofone, and a provider of roaming service to Radiofone, is BellSouth. In a pending complaint proceeding, Radiofone documents BellSouth's record of anticompetitive conduct. Radiofone, Inc. v. BellSouth Mobility, Inc., E-88-109, filed Aug. 2, 1988 (supplemented in 1991 and 1995). BellSouth's wireless operations have unlawfully discriminated in favor of their own affiliates, at the expense of Radiofone and its customers, in the matter of cellular roaming. BellSouth has advertised that it provides roaming services for no additional fee -- the same roaming services that it provides to Radiofone's customers for a

⁴ GTE Comments at 5-6.

fee. In addition, BellSouth denied roamer access to Radiofone's subscribers, billed Radiofone roaming airtime fees that were higher than BellSouth's tariffed rates, and refused to issue credits for these actions. The damages suffered by Radiofone are estimated to be over \$17 million, as of two years ago.⁵ The non-discrimination requirement of Section 202 of the Act is a key element in Radiofone's complaint before the FCC.⁶

As noted by the Commission in the context of broadband PCS:

[I]f we were to forbear from enforcing sections 201 and 202, parties would likely turn to the courts for relief from perceived unjust and unreasonable carrier practices. We believe that since the courts lack the Commission's expertise, developed over decades, in evaluating carriers' practices, carriers would face inconsistent court decisions and incur unnecessary costs. This could result in consumers receiving differing levels of service and protection depending upon the jurisdiction in which they live, contrary to the intent of Congress in amending section 332(c).⁷

In addition, it is unclear what bases carriers would have for filing complaints in court. Without Sections 201 and 202,

⁵ These facts are summarized in Initial Brief of Radiofone at 3-15, 45-46, Radiofone, Inc. v. BellSouth Mobility, Inc., E-88-109 (June 10, 1996)

⁶ BellSouth's anticompetitive acts have continued to this day. Radiofone requested reciprocal compensation from BellSouth on December 3, 1996, and currently compensates BellSouth for interconnection services it provides in Louisiana at BellSouth's tariffed rates. BellSouth, however, is currently refusing to pay Radiofone any further compensation. Altogether, BellSouth currently owes Radiofone approximately \$709,889.00 in unpaid interconnection charges. These facts are documented in Reply Comments of Radiofone, Inc., Second Application of BellSouth for Provision of In-Region InterLATA Services in Louisiana, CC Docket No. 98-121 (filed Aug. 28, 1998).

⁷ MO&O para. 30.

carriers and consumers may need to rely on state laws which may not be applicable to the carriers involved, which may not address the conduct at issue, or for which there may be little relevant precedent.

Sections 201 and 202 are the cornerstones of the Commission's assurance that carriers will engage in fair practices. It is imperative that Sections 201 and 202 of the Act remain applicable to all CMRS providers, just as the Commission decided to retain Sections 201 and 202 for broadband PCS providers.

Respectfully submitted,

RADIOPHONE, INC.

By Benjamin H. Dickens, Jr. / *spz*
Benjamin H. Dickens, Jr.
Susan J. Bahr

Blooston, Mordkofsky,
Jackson & Dickens
2120 L Street, NW - Suite 300
Washington, DC 20037
(202) 659-0830

September 2, 1998